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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1315

MARGARET LORETTA NOLTE, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Keith C. Monroe
Attorney at Law
1428 North Broadway
Santa Ana, California 92706
Telephone (714) 547-5683

KEITH C. MONROE
ATTORNEY AT LAW
1428 NORTH BROADWAY
SANTA ANA, CALIFORNIA 92706
TELEPHONE 547-5683

KEITH C. MONROE
ATTORNEY AT LAW
1428 NORTH BROADWAY
SANTA ANA, CALIFORNIA 92706
TELEPHONE 547-2683

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KEITH C. MONROE
ATTORNEY AT LAW
1428 North Broadway
Santa Ana, California 92706
Telephone 547-3663

Petitioner, MARGARET LORETTA NOLTE, by her counsel, Keith C. Monroe, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit as that judgment affirms her guilt, and the guilt of her co-defendants, BENNIE RALPH TIMMONS and DAVID FREDDIE HILEMAN, of the crime of receiving, concealing and facilitating the transportation and concealment of illegally imported marijuana, in violation of Title 21 U. S. C. section 176 (a).

OPINION BELOW

The opinion of the court below is not yet published, but will be reported in ___ F. 2d ___ (C. A. 9, 1970). A copy of the opinion (Appendix A, infra, p. 19) is appended to this petition.

JURISDICTION

The judgment of the United States Court of Appeals was entered on November 9, 1970. A petition for rehearing was filed and was denied by the court by an order (Appendix B, infra, p. 20) entered on December 29, 1970. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. section 1254, in light of United States v. Healy, 376 U. S. 75 (1964).

QUESTIONS PRESENTED

Four fundamental questions are raised by this case:

1. In the absence of any evidence of the source of an informant's knowledge, whose identity remains undisclosed, is a hearsay statement, claimed to have been made by the informant, that contraband will be imported in a given vehicle on a stated date sufficient to constitute probable cause, after following the vehicle 90 miles with stops, to force entry to a residence and arrest the occupants of the vehicle?

2. Where no evidence is offered as to the source of an undisclosed informant's claimed knowledge of illegal activity, may the Government, consistent with due process, rely on an inference of personal knowledge based on the detailed nature of the information supplied but simultaneously refuse disclosure of his identity where if the knowledge was personal the informant's testimony would be highly material to which of four defendants had knowledge of an essential element of the crime charged?

3. Is a defendant's right to confront witnesses prejudicially denied by permitting a Government witness to recite before the jury incriminating information allegedly received from an undisclosed informant which is relevant only to the existence of probable cause for arrest?

4. In the absence of any evidence to show petitioner's knowledge of presence in the vehicle of marijuana seized from a vehicle which she had driven for a few minutes several hours before, is her conviction of smuggling consistent with due process?

KEITH C. MONROE
ATTORNEY AT LAW
1488 North Broadway
SANTA ANA, CALIFORNIA 92706
Telephone 547-3663

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional and statutory provisions are involved in this case:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." 4th Amendment, Constitution of the United States.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War

KEITH C. MONROE
ATTORNEY AT LAW
1426 NORTH BROADWAY
SANTA ANA, CALIFORNIA 92706
TELEPHONE 547-5663

or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Fifth Amendment, Constitution of the United States.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." Sixth Amendment, Constitution of the United States.

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned for not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition may be fined not more than

$20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

For provisions relating to sentencing, probation, etc., see section 7237 (d) of the Internal Revenue Code of 1954. Feb. 9, 1909, C. 100, § 2 (h), as added July 18, 1956, c. 629, Title I, § 106, 70 Stat. 570." United States Code, Title 21, section 176 (a). U. S. C. A., Title 21, p. 210.

KEITH C. MONROE
ATTORNEY AT LAW
1428 North Broadway
Santa Ana, California 92706
Telephone 547-5663

STATEMENT OF THE CASE

Acting on information received from a previously reliable informant, Customs agents saw two vehicles, a light green Chevrolet El Camino displaying temporary license 5445 and a 1963 white Chevrolet station wagon displaying license LJF 427, enter the United States from Tijuana, Mexico. According to the informant, Agent Burnett stated, the El Camino would be carrying a large quantity of marijuana. The agents followed the two cars from the Mexican border northward. Both vehicles stopped at a restaurant in San Ysidro a short distance inside the United States. Just prior to this stop, the petitioner was the sole occupant and driver of the El Camino. The defendants Clark Gable Timmons (who is not a party in this Court), David Freddie Hileman and an unidentified individual (who was not charged) were present in the Chevrolet station wagon. No evidence was offered to show that Bennie Ralph Timmons either was present in or had any connection with either vehicle so far as

KEITH C. MONROE
ATTORNEY AT LAW
1428 North Broadway
Santa Ana, California 92706
Telephone 547-5683

the agents knew prior to his later arrest.

At the restaurant in San Ysidro, defendants Clark Gable Timmons and David Hileman got out of the station wagon, walked back to the El Camino and apparently had a short conversation with petitioner. Hileman then entered the El Camino behind the wheel, Clark Gable Timmons returned to the station wagon and both cars proceeded northward. [R. Tr. 301]*

The agents kept the El Camino under nearly continuous surveillance from San Ysidro to its ultimate destination, a residence in Santa Ana, California. [R. Tr. 302-03] The station wagon was lost from the surveillance at some point during the trip, which was of nearly two hours duration. The El Camino arrived at 2519 So. Salta Street, Santa Ana, California, about 1 p.m. At about 1:30 p.m. the agents entered the residence and arrested petitioner, David Freddie Hileman, Bennie Ralph Timmons and Bennie Timmons's wife, Nancy Ann Timmons, who was later released. At the time of entry into the residence premises, the petitioner, Margaret Loretta Nolte was seated at the kitchen table. [R. Tr. 223-24] No contraband was found there. At the time of entry into the residence, the agents had neither search nor arrest warrants for any party or place involved. [R. Tr. 9] The evidence recited above includes everything known to the agents upon which reliance was placed in support of a showing of probable cause to enter the residence and arrest the occupants. In fact, the entire Government showing in opposition to the motion of defendants to suppress evidence consisted of a two-page affidavit of Agent Burnett. [R. Tr. 11-12; C. T. 27-28]* A copy of that affidavit is appended to this petition. (Appendix C, infra, pp. 21-22).

Pre-trial motions were made on behalf of all defendants to suppress evidence, to compel disclosure of the identity of

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* R. T. refers to page number of Reporter's Transcript.
* C. T. refers to page number of Clerk's Transcript.

the informant, to dismiss the indictment and for other relief. [R. Tr. 6] The motions were denied [R. Tr. 143, 153], were renewed during trial and were again denied. [R. Tr. 385-417]

In addition to the foregoing evidence, testimony was given at trial which tended to show defendant Bennie Timmons was the registered owner of the two vehicles involved. [Ex. 1 and 2; R. Tr. 373-74] In addition, telephone records were introduced into evidence which showed that telephone calls had been placed between the residence of Bennie Timmons in Santa Ana and the residence of Clark Timmons in San Diego County. [R. Tr. 277, 381-82]

Even though the matter of probable cause for the ultimate arrest had been explored at length on the pre-trial motion to suppress [R. Tr. 1-148] Agent Burnett was permitted at the jury trial, over objection, to testify to what he had been told by the informant, whose identity was never disclosed and who did not appear as a witness. [R. Tr. 217-220] Thereafter, Agent Martin was asked what information he had received from Agent Burnett prior to commencing his surveillance of the two vehicles. Even though an objection was sustained to the question [R. Tr. 294-95], the witness then proceeded, over objection, to testify to what information he had at the time he went to the border. [295-98]

Upon hearing of the pre-trial motions, the attorney for the Government, without being sworn as a witness, was asked if the informant was a participant in the transaction. His response was, "No, your Honor." [R. Tr. 89] Various objections and lengthy argument was made on the basis that if the informant was an observer to the purchase or loading of the contraband in Mexico, his testimony would be highly material to showing that this petitioner had any knowledge of those activities. [R. Tr. 142] Upon request for a statement under oath that the informant was not a participant, the trial court stated, "That is too bad." [id.]

KEITH C. MONROE
ATTORNEY AT LAW
1428 NORTH BROADWAY
SANTA ANA, CALIFORNIA 92706
TELEPHONE 547-3663

The jury returned verdicts of guilt as to all defendants. Defendants Hileman, Nolte and Bennie Timmons were each sentenced to five years in prison. Defendant Clark Gable Timmons was sentenced to seven years in prison. [C. T. 64, 69-71] All defendants were granted and posted bail pending appeal and are presently at liberty. Appeals were perfected to the Court of Appeals for the Ninth Circuit. Appellants Hileman, Nolte and Clark Gable Timmons, according to their Notices of Appeal [C. T. 65, 72-74], were represented on appeal by their respective trial counsel; whereas petitioner Bennie Timmons was apparently not represented on appeal. The Court of Appeals reversed the judgment as to Clark Gable Timmons and affirmed the judgments as to Hileman, Nolte and petitioner Bennie Timmons. [Appendix A, infra, p.19] This petition follows.

KEITH C. MONROE
ATTORNEY AT LAW
1428 North Broadway
Santa Ana, California 92706
Telephone 547-5683

REASONS FOR GRANTING THE WRIT

Showing the existence of probable cause and identity of the informant.

This case presents, on a uniquely short, clear, uncontradicted record, fundamental questions which go to the essence of the Fourth and Fifth Amendments to the Constitution. Inasmuch as the first two questions raised are very closely interlinked, they will be discussed jointly.

It is more than tempting in this phase of this petition to merely invite the Court's attention to the concurring opinion of Mr. Justice White in Spinelli v. United States, 393 U. S. 410, 423-29 (1969) and from there to move on to consideration of the informant disclosure problem. But there is a distinction in this case which seems to even more clearly highlight the logically irresoluble "tension" that exists between the Nathanson-Aguilar-Spinelli[1] cases and Draper v. United States, 358 U. S. 307 (1959).

1 Nathanson v. United States, 290 U. S. 41 (1933); Aguilar v. Texas, 378 U. S. 108 (1964); Spinelli, supra.

Mr. Justice Harlan, interpreting Draper in Spinelli, suggests that a magistrate confronted with the detailed description which was supplied of Draper could reasonably infer, from the information itself, "that the informant had gained his information in a reliable way." 393 U. S. at 417. Of course this is true if one assumes that the reason the informer is able to supply "such detail" is that the informer has personal knowledge either as a participant or as a direct observer. Mr. Justice White apparently viewed it in this light:

> "But it is arguable that on these facts it was the informant himself who has perceived the facts, for the information reported is not usually the subject of casual, day-to-day conversation. Because the informant is honest and it is probable that he has viewed the facts, there is probable cause for the issuance of a warrant." 393 U. S. at 426.

But if the detailed information does not in fact derive from the informer's personal knowledge, either as a participant or a direct observer, then the entire showing of probable cause rests on information which is hearsay on hearsay on hearsay and which originates from a source which is not only totally untested, it is totally unknown so far as the courtroom proceedings are concerned. And from that point, the statement of Justice Tobriner in Ovalle v. Superior Court, 202 Cal. App. 2d 760, 763; 21 Cal. Rptr. 385 (1962) is appropos:

> "The quantification of the information does not necessarily improve its quality; the information does not rise above its doubtful source because there is more of it."

And this brings into focus the crucial distinction that is present in this case. The trial judge was satisfied, from the United States Attorney's statement that the informant was not a participant in the transaction, that that fact had been established. [R. Tr. 89, 142] Therefore, unless one makes the highly question-

KEITH C. MONROE
ATTORNEY AT LAW
1428 NORTH BROADWAY
SANTA ANA, CALIFORNIA 92706
TELEPHONE 547-5683

able assumption that the informant was engaged in his own course of private detective work in Mexico, it necessarily follows that the informant's information had to be secondhand when he got it.

In principle, then, the question resolves itself to the recurring question which was presented under Rabinowitz v. United States, 339 U. S. 56 (1950). Rabinowitz, a fully supportable decision on its own facts, nevertheless led many lower courts to leap from the limited facts on which the case rested to the conclusion that as long as a valid arrest had been made on the premises, there then arose an ipso facto right to search the entire premises. See cases cited in Petitioner's Opening Brief, Chimel v. California, Appendix B, pp. 33-38, No. 770 O. T., 1968, 395 U. S. 752. In other words, the policeman making an arrest, under the general lower court interpretation of Rabinowitz, had broader powers to search the place of arrest than he would have had under a search warrant issued for the purpose, for in order to obtain the warrant he would have had to specify that for which he wished to search. But by proceeding without a warrant, the requirement of probable cause to believe specific seizable items were on the premises could be bypassed altogether, just so long as there was a valid arrest. There can be no vitality left in the Fourth Amendment if a search without warrant may proceed upon less evidence than the Constitution demands for a search with warrant.

If, as in this case, less specificity is required for information derived from an unrevealed source than from a disclosed source, as in Draper, the days of probable cause as a legitimate legal principle are numbered. No Government agent with an ounce of sense will concern himself in the slightest with corroborating the crucial question, "How reliable is the information that a crime is being committed?" On the contrary, an exploration of that question might well lead to failure to be able to show probable cause. Thus, it will behoove field officers generally to obtain great

KEITH C. MONROE
ATTORNEY AT LAW
1428 NORTH BROADWAY
SANTA ANA, CALIFORNIA 92706
TELEPHONE 547-5663

detail on every bit of essentially irrelevant information, and consciously avoid the only relevant question, "How did he learn what he is telling me?" If this is the law, then the Fourth Amendment is not.

Finally, on the issue of probable cause, the trial court stated:

> "You better proceed beyond the Draper case. The Draper case is indistinguishable, absolutely indistinguishable from this case." [R. Tr. 411]

It is suggested that both the trial court and the Court of Appeal overlooked the most telling distinction between Draper and this case: Hereford (the Draper informant) was sufficiently familiar with Draper to be able to, and he did, identify him by name.

> "On September 3, 1956, Hereford told Marsh that James Draper (petitioner) recently had taken up abode at a stated address in Denver and 'was peddling narcotics to several addicts' in that city. Four days later, on September 7, Hereford told Marsh ' that Draper had gone to Chicago the day before [] by train [and] that he was going to bring back three ounces of heroin [and] that he would return to Denver either on the morning of the 8th of September or the morning of the 9th of September also by train.'" 358 U. S. at 309.

While it is true, as a general principle, that the name of a suspect need not be known to justify his arrest, the failure of the informant to identify any participant in this case by name, or even by a personal description or descriptions, has a much broader significance. Failure, in this case, to supply a name or names, or lacking that a description of one or more persons, or failing that even to state the number of persons and their sexes, raises a compelling inference that the informant simply did not know who the purchasers or transporters were. And if that inference is correctly drawn, it is inescapably true that the informant

KEITH C. MONROE
ATTORNEY AT LAW
1428 NORTH BROADWAY
SANTA ANA, CALIFORNIA 92706
TELEPHONE 547-3683

KEITH C. MONROE
ATTORNEY AT LAW
1428 North Broadway
Santa Ana, California 92706
Telephone 547-5683

could not have had personal knowledge and simply parroted to Agent Burnett something that someone else had told him.

" . . and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . .." Evidence required to support a search or seizure without a warrant must rise at least to the level of evidence which would be required to obtain a warrant for the same purpose. Johnson v. United States, 333 U. S. 10, 13-14 (1947). To require less would be to nullify the Fourth Amendment preference for antecedent justification. Thus, the question is, could a magistrate issue a valid arrest warrant based on an affidavit phrased as follows:

> "I was told on this date by an informant who has supplied correct information on two recent occasions that he was told by another person, whom he did not identify and who is unknown to me, that marijuana was to be imported today in one of two cars which he described by color, year, make and license number, etc. Shortly afterward two cars matching the description passed the border."

Such an affidavit could stand only at the expense of being "unsupported by Oath or affirmation" and at the expense of Nathanson, Aguilar, Ventresca, Spinelli[2]. . .. The judgment in this case cannot stand at that expense.

The other branch of this phase of the case rests on the assumption that not only was the informant personally reliable and worthy of belief but on the further assumption, which is unsupported by any evidence in the record, that his source of information was at least equally reliable, whatever the source may have been. Even though petitioner urges that the second assumption is not justified, it would appear that the lower courts are

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2 Nathanson v. United States, 290 U. S. 41 (1933); Aguilar v. Texas, 378 U. S. 108 (1964); United States v. Ventresca, 380 U. S. 102 (1965); Spinelli v. United States, 393 U. S. 410 (1969).

KEITH C. MONROE
ATTORNEY AT LAW
1428 NORTH BROADWAY
SANTA ANA, CALIFORNIA 92706
TELEPHONE 547-5683

in conflict between circuits as to just how far that unsupported assumption may be relied upon as a substitute for probable cause.

The Second Circuit held, in a similar case, that the scope of inquiry on examination of an officer who claimed to have probable cause to arrest was dependent on what evidence was known to the officer at the time, independent of the informer, to support probable cause. United States v. Robinson, 325 F. 2d 391 (1963). In that case, the informant was described as a "special employee of the government" and named the two defendants, indicating that they would be arriving that day bearing narcotics. Apparently both defendants, as well as their place of residence, were well known to the arresting officers. On inquiry by defense counsel as to the informant's name, the trial court sustained the objection of the government. The Court of Appeals held that this was error and remanded the case to the District Court for further hearing on the identity of the informant and his reliability. In doing so, the Court of Appeals observed that the informant's information was central to whether or not there was probable cause to arrest. If there was other corroborating information which would support the arrest, the identity of the informant need not be disclosed. The court went on to say:

> "However, where it is essential to the proper determination of the validity of an arrest the government must either disclose or run the risk of having the arrest held invalid." 325 F. 2d at 394.

But Robinson was modified to some extent by language which appears in United States v. Tucker, 380 F. 2d 206, 211 (C. A. 2, 1967). Tucker was a situation where an earlier sale of narcotics to a government agent had been made by an observed associate of the defendant. The court suggests that the independent evidence was very possibly sufficient, standing alone, to provide a showing of probable cause. Then, the court states

that, under Roviaro, "disclosure would be required only where independent evidence was so insubstantial that in essence 'the existence depends solely upon the reliability of an informer . . .'" Since the sum of the evidence in Tucker was not even claimed by the defense to be insufficient to show probable cause, the judgment of conviction was affirmed, inasmuch as the major showing was made independent of the informer's information. Tucker was decided subsequent to, and cites, the decision in McCray v. Illinois, 386 U. S. 300 (1967). It does not appear that the Tucker statement of the rule applied in the Second Circuit has been impaired by the decision in United States v. Soyka, 394 F. 2d 443 (1968). The problem there was whether probable cause had been shown at all, since the identity of the informant was not known to the government, even though the informant had established his reliability by previously supplying telephone information. The court, on rehearing in banc, held that the extremely minute description supplied by the informant, when it was coupled with a suspicious response by the defendant upon encountering an agent at his door, in sum was sufficient to provide probable cause. Thus, the Second Circuit, under Tucker, will apparently order disclosure of an informant's identity when the "existence of [probable cause] depends solely upon the reliability of an informer." Accord, United States v. Cappabianca, 398 F. 2d 356 (C. A. 2, 1968).

The District of Columbia apparently follows a rule which conflicts with that followed in the Second Circuit, for the court in Smith v. United States, 358 F. 2d 833 (C. A. D. C. 1966) emphasizes the fact that Aguilar, on its facts, dealt with search of a dwelling. The Smith facts are generally similar to Draper and on that basis, buttressed by the arresting officer's general knowledge of one defendant as a narcotics dealer, the conviction was affirmed. Inasmuch as the conduct of the defendants in Smith

KEITH C. MONROE
ATTORNEY AT LAW
1428 North Broadway
SANTA ANA, CALIFORNIA 92706
TELEPHONE 547-3663

KEITH C. MONROE
ATTORNEY AT LAW
1428 North Broadway
Santa Ana, California 92706
Telephone 547-5683

was neither suspicious nor even unusual, it would appear that disclosure, which was denied in that case, would have been granted in the Second Circuit. But of particular relevance to the case at bar is the reference in both the majority and dissenting opinions in Smith to Perry v. United States, 336 F. 2d 748 (C. A. D. C. 1964). In that case the showing of probable cause rested in substantial measure on a "reliable" informant's tip, and on independent police observation of suspicious conduct, which did not independently reach the level of probable cause. Or, to state it positively, the showing of probable cause rested on an amalgam of the "tip" and the defendant's observed conduct. Defense counsel asked the arresting officer how the informer was paid, how he usually gave his tips, whether he was an addict, and what his relationship to the arresting officer was. The officer was permitted to testify that the informer had provided "about three" other tips which had"proven reliable." The prosecutor's objections to other questions in this area were sustained. The Court of Appeal reversed on the ground that such preclusion of cross-examination deprived the defendant of evidence which might well have affected the court's decision as to probable cause. It seems clear that the Second Circuit would surely have permitted the cross-examination which was sought in Perry.

The case at bar is in conflict with both the Second Circuit in Tucker and the District of Columbia in Perry. The conduct involved here was simply that two cars stopped openly, in daytime and then, after a short discussion, a passenger in one took over as driver of the other. If it is suspicious conduct to stop a quarter of a mile, and presumably within sight, of the border and to switch drivers, it is as innocuous a suspicious showing as might be imagined. The Second Circuit would seemingly require disclosure of the informant's identity on this evidence. Alternatively, it would appear that the District of Columbia

KEITH C. MONROE
ATTORNEY AT LAW
1428 NORTH BROADWAY
SANTA ANA, CALIFORNIA 92706
TELEPHONE 547-5683

would support the defendant's right to cross examine the officer as to the informant's presence at the loading of the vehicle, the conversations that the officer had with the informant, whether or not the informant was paid, what steps the officer took to confirm his conclusion that the informant was reliable and other questions bearing on that conclusion. Presumably, as the Perry court suggests, answers to those questions would lead to other questions which would tend to reveal some of the underlying facts on which the informant based his conclusions. The trial court in this case permitted the officer to name two defendants in one pending case in which the same informer supplied information. [R. Tr. 14] Beyond that the court sustained as immaterial questions as to the informant's presence at the loading of the vehicle [R. Tr. 42], number of conversations with the informant [R. Tr. 54], whether or not the informant was paid [R. Tr. 54], the place of meeting the informant [R. Tr. 59], and what steps the officer took to determine the informant's reliability [R. Tr. 59]. Following this, the court informed counsel that as to underlying facts relating to the informant's reliability, "We have given you all that . .." [R. Tr. 64] (emphasis added.)

Disclosure of the informant's identity was sought in this case both as to probable cause on the motion to suppress and at trial relative to the question of guilt. [R. Tr. 394-97] In the absence of any direct evidence whatsoever that petitioner had knowledge of the presence of the marijuana in the vehicle, the testimony of the informant or the informant's informant relative to petitioner's presumed lack of participation in the purchase and loading would be compelling on her behalf. As in Roviaro v. United States, 353 U. S. 53 (1957), petitioner here had no other witness who might aid her, other than herself at the cost of her constitutional right to remain silent. Review in this Court is necessary to resolve the constitutional questions posed and to

settle, under this Court's supervisory powers, the conflicts which exist between the Second, Ninth and District of Columbia Circuits.

Confrontation of Witnesses

Agent Burnett testified at the pre-trial motion to suppress relative to the information he had received from the informant. In denying the motion to suppress, the court necessarily held that probable cause had been shown and thus eliminated that issue from the case at the trial in chief. Despite this posture, Agent Burnett was permitted to testify at trial, and in the presence of the jury, over objection, as to just what the "confidential, reliable informant" had told him. [R. Tr. 219-220] This was later followed up by permitting Agent Martin to go through the bulk of this crushing and unanswerable hearsay again. [R. Tr. 294-97]

The court stated at bench, out of the hearing of the jury, that this evidence was admitted to show the state of mind of the officers. The jury was never instructed that this evidence was admitted for a limited purpose. [R. Tr. 209-11] The basic error in admitting this evidence, which was sufficient to convict this petitioner by itself after her identification as one of the drivers, was that it served no purpose whatsoever except to illegally buttress the government's case. The state of mind of the officers was not, at that point, relevant to any issue in the case. In the absence of this unauthorized hearsay on hearsay evidence, there was no direct evidence to show that anything had been imported. It is inconceivable that the Government can successfully resist disclosure of the informant but at the same time use his statement as unlimited evidence before the jury. Admission of this evidence would have been denied in 1899 and there is no reason why it should be permitted 70 years later. Kirby v. United States, 174 U. S. 47, 55 (1899).

KEITH C. MONROE
ATTORNEY AT LAW
1428 NORTH BROADWAY
SANTA ANA, CALIFORNIA 92706
TELEPHONE 547-5683

KEITH C. MONROE
ATTORNEY AT LAW
1428 NORTH BROADWAY
SANTA ANA, CALIFORNIA 92706
TELEPHONE 547-5683

Knowledge of Presence

Petitioner suggests that no evidence was adduced in this case to show that she had knowledge that the El Camino contained contraband at the time she drove it across the border. However, this contention is subsidiary to the primary point preceding relative to confrontation of witnesses. It is clear that there is evidence in this record from which one might reasonably infer that petitioner had obtained knowledge of the contents of the vehicle from one or more of the co-defendants. And it is of course true that this Court will not relitigate factual determinations which rest on any substantial evidentiary basis. But the point is raised here, not to obliquely suggest an evidentiary re-evaluation, but rather to suggest the probable prejudice which is revealed on the face of the record. In that posture, it would appear that Chapman v. California, 386 U. S. 18 (1967) would require reversal and remand for a new trial.

CONCLUSION

Based upon the foregoing arguments and authorities, the petitioner respectfully requests that this petition be consolidated with that of her co-defendant, Bennie Ralph Timmons, No. 1279, O. T. 1970, and that a writ of certiorari to the Court of Appeals for the Ninth Circuit be granted.

Keith C. Monroe
Attorney for Petitioner

FILED

NOV 9 1970

WM. B. LUCK, CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. BENNIE RALPH TIMMONS; MARGARET LORETTA NOLTE; CLARK GABLE TIMMONS; and DAVID FREDDIE HILEMAN, Defendants-Appellants.	No. 25,766 No. 25,809 No. 25,820 No. 25,826

Appeal from the United States District Court for the Southern District of California

Before: CHAMBERS, ELY and WRIGHT, Circuit Judges.

PER CURIAM:

The judgment of conviction is affirmed as to all appellants except as to Clark Gable Timmons.

There was improper hearsay evidence admitted. As to Clark Gable Timmons, this testimony may well have been the determining factor in the jury's mind. As to the remaining defendants, other testimony was overwhelming.

Additional points raised are without merit.

APPENDIX A

FILED

DEC 29 1970

WM. B. LUCK, CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

BENNIE RALPH TIMMONS,
MARGARET LORETTA HOLTE,
CLARK GABLE TIMMONS and
DAVID FREDDIE HILEMAN,

Defendants-Appellants.

No. 25,766
No. 25,809
No. 25,820
No. 25,826

ORDER DENYING
PETITIONS FOR REHEARING

Before: CHAMBERS, ELY and WRIGHT, Circuit Judges.

All petitions for rehearing are denied. In doing so, the court treats as a petition for rehearing a letter from Bennie R. Timmons, wherein he requests a rehearing on the basis of Margaret Loretta Holte's petition for rehearing.

AFFIDAVIT OF DAVID BURNETT

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

DAVID BURNETT, being first duly sworn, deposes and says:

1. That he is a United States Customs Agent assigned to the San Ysidro, California area;

2. That on or about April 6, 1969, he received information from a confidential and previously reliable informant that a 1969 light green Chevrolet El Camino, temporary license plate number 5445, was about to enter the United States from Tijuana and that it contained a large quantity of marihuana. The informant also stated that the purchasers of the marihuana were driving a 1963 white Chevrolet station wagon, California license number LJF 427, and that this vehicle would probably accompany the load vehicle into the United States.

3. That on April 6, 1969, he knew the informant to be reliable because said informant had previously given information on two occasions regarding marihuana smuggling which resulted in one conviction in Federal Court and one case which is still pending. The informant had also given information regarding marihuana dealing in Tijuana which had been verified by other sources.

4. That on April 6, 1969, he communicated the above information from the informant to other U.S. Customs Agents, including Agent Paul Martin.

5. That on April 6, 1969, at approximately 11:10 A.M., Agent Martin advised me that he had observed first the aforementioned station wagon, occupied by three men, and then the El Camino, driven by a woman, enter the United States at the port of entry, San Ysidro, California.

6. That at approximately 11:15 A.M. on the same date, he observed the station wagon and El Camino at Denny's restaurant in San Ysidro. One of the men who had previously occupied the station

wagon was observed in the El Camino with the woman.

7. That on April 6, 1969, he, assisted by other Customs agents, maintained continuous surveillance of the load vehicle, the El Camino, from the area of Denny's Restaurant in San Ysidro, to a residence at 2519 South Salta Street, Santa Ana, California, arriving there at approximately 1:00 P.M.

8. That at approximately 1:30 P.M., defendants BENNIE RALPH TIMMONS, MARGARET LORETTA NOLTE and DAVID FREDDIE HILEMAN were arrested at the residence, as was Nancy Ann Timmons, the wife of defendant Bennie Timmons.

9. That at approximately 2:10 P.M. on the same date, defendant CLARK GABLE TIMMONS was arrested when he arrived at the residence.

10. That defendants CLARK GABLE TIMMONS, DAVID FREDDIE HILEMAN and MARGARET LORETTA NOLTE were observed by Customs Agent Paul Martin at approximately 11:10 A.M. on the same date, as three of the four persons who entered the United States at the port of entry at San Ysidro, California, in the station wagon and El Camino.

David Burnett
DAVID BURNETT
Affiant

SUBSCRIBED and SWORN to before me this 20th day of June, 1969.

Esperanza M. Gomez
ESPERANZA M. GOMEZ
Notary Public in and for said County and State

My Commission Expires: ESPERANZA M. GOMEZ
My Commission Expires Oct. 4, 1969

OFFICIAL SEAL
ESPERANZA M. GOMEZ
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY

FPI-LPS-0-67-10000-0184

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APPENDIX C

Supreme Court, U.S.
FILED
FEB 5 1971
E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1315

MARGARET LORETTA NOLTE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

MOTION FOR LEAVE TO DISPENSE WITH PRINTING THE PETITION FOR CERTIORARI

Keith C. Monroe
Attorney at Law
1428 North Broadway
Santa Ana, California 92706
Telephone (714) 547-5683

Attorney for Petitioner

KEITH C. MONROE
ATTORNEY AT LAW
1428 NORTH BROADWAY
SANTA ANA, CALIFORNIA 92706
TELEPHONE 547-5683

KEITH C. MONROE
ATTORNEY AT LAW
1428 NORTH BROADWAY
SANTA ANA, CALIFORNIA 92706
TELEPHONE 547-5683

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Motion is hereby made, on the basis of the annexed affidavit of Margaret Loretta Nolte, the petitioner in this case, for leave to dispense with the printing of the petition for certiorari.

Keith C. Monroe
Attorney for Petitioner

AFFIDAVIT OF MARGARET LORETTA NOLTE

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

MARGARET LORETTA NOLTE, being duly sworn, deposes and says:

1. I am submitting this affidavit for use in support of a motion to dispense with printing of the petition for certiorari being filed on my behalf in the Supreme Court of the United States.

2. I am a person of limited means, not presently employed. Although I doubt that I could appropriately execute the affidavit required under the in forma pauperis statute, and therefore I am paying the $100.00 fee required for the docketing of the petition for certiorari in this case, nevertheless my limited means make it highly important to me that further costs of this litigation be minimized.. I do not possess any substantial savings; I have two minor children and am divorced, and my living expenses and necessary obligations are approximately equal to my income. Accordingly, leave is requested to dispense with printing the petition for certiorari which this motion accompanies.

Margaret L. Nolte
Margaret Loretta Nolte

Subscribed and sworn to before me on this 2nd day of February, 1971:

Waynne E. Monroe
Notary Public for said County and State

OFFICIAL SEAL
WAYNNE E. MONROE
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
ORANGE COUNTY
My Commission Expires February 19, 1972

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1279

BENNIE RALPH TIMMONS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1315

MARGARET LORETTA NOLTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals is reported at 432 F. 2d 1011. (Pet. App. A).[1]

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1970, and petitions for rehearing were

[1] The two petitions have identical appendices.

denied on December 29, 1970. The petition in No. 1279 was filed on January 28, 1971. In No. 1315 the petition was not filed until February 5, 1971, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for the arrest and incidental seizure of marihuana.
2. Whether the trial court properly refused to require disclosure of an informant's identity.
3. Whether petitioners were prejudiced because of the admission of certain statements made by the informant to a customs agent.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioners and two co-defendants were convicted of violating 21 U.S.C. 176a in regard to the illegal importation of marihuana. Each was sentenced to five years' imprisonment. The court of appeals affirmed petitioners' convictions in a *per curiam* opinion (Pet. App. A).

On April 6, 1969, Customs Agent Burnett received information from an informant that a 1969 light green Chevrolet El Camino truck, bearing temporary license plate number 5445, was about to enter the United States from Tijuana, Mexico, and that it contained a large quantity of marihuana (Tr. 10–12, 35,

219–221).[2] The informant also stated that the purchasers of the marihuana would probably accompany this truck into the United States in a 1963 white Chevrolet station wagon, bearing California license number LJF–427 (Tr. 10–12, 35, 219–221; Pet. App. C).[3] Agent Burnett communicated this information to agents Van Diver and Martin. Martin was instructed to maintain surveillance at the port of entry, San Ysidro, California. (Tr. 219–220, 293–297; Pet. App. C).

Martin shortly thereafter observed the Chevrolet station wagon enter the United States followed by the El Camino truck (Tr. 67, 297–298). Each automobile bore the license plate numbers specified by the informant (Tr. 297–298); petitioner Nolte was alone driving the truck (Tr. 299–300). Shortly after crossing the border both cars stopped at a restaurant and two men got out of the station wagon and conversed for a short time with Miss Nolte (Tr. 26, 298, 301). One (co-defendant Hileman) remained with Miss Nolte and thereafter drove the truck (Tr. 301).

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[2] We are lodging with the clerk the three-volume transcript of proceedings.

[3] Pet. App. C is a copy of the affidavit of agent Burnett submitted in opposition to the motion to suppress. That affidavit states that the informant had previously given information in two previous cases regarding marihuana smuggling; that one case had resulted in a federal conviction and the other was still pending; and that the informant had also given information regarding Tijuana marihuana dealing which had been verified by other sources (Pet. App. C). Burnett reaffirmed the truth of his affidavit when he took the stand at the hearing on the motion to suppress (Tr. 11).

Several agents followed the truck to a residence in Santa Ana, California, about 90 miles from the border (Tr. 20–21, 220, 302).[4] Hileman backed the truck inside the garage and petitioner Timmons (who had not been seen in the vehicles crossing the border) shut the garage door (Tr. 354–355). A few minutes later the agents knocked on the door of the residence, identified themselves as federal officers and announced that their purpose was to place the occupants under arrest (Tr. 223). Petitioner Nolte was arrested while sitting at a kitchen table directly in front of an open door leading to the garage (Tr. 223–225, 240); petitioner Timmons was arrested in front of a washer and dryer upon which several bricks of marihuana taken from the truck had been stacked (Tr. 27–28, 224–227, 306). The house and both cars belonged to petitioner Timmons (Tr. 242, 373).

Disclosure of the informant's identity was denied both at the hearing on the motion to suppress and at the trial (Tr. 143, 234–235).

ARGUMENT

1. Petitioners argue that there was insufficient probable cause for their arrest under the standards of *Spinelli* v. *United States*, 393 U.S. 410. There are in this case, however, two crucial factors not present in *Spinelli* which render that decision inapplicable. Customs Agent Burnett explained that he regarded the

[4] The station wagon, driven by co-defendant Clark Timmons, was lost in traffic (Tr. 302) and arrived at the Santa Ana residence after the arrest of the others. When he arrived Clark Timmons was also placed under arrest (Tr. 308, 322–328, 357, 362).

informant as reliable because of the reliable information he had given in the past. Secondly, the information provided by the informant was quite specific as to the vehicles involved, including their description, license numbers, the fact that the truck would be carrying the marihuana and that the purchasers would probably be crossing the border in the car at the same time as the truck. This particularized information was sufficient to support a reasonable conclusion that the informant was reporting more than "casual rumor" based on "general reputation," *Spinelli, supra,* 393 U.S. at 416. This conclusion was strengthened by agent Martin's personal observations at the border.[5] The totality of the circumstances thus provided probable cause to make an arrest. *Draper* v. *United States,* 358 U.S. 307, 313; see *Ker* v. *California,* 374 U.S. 23; *McCray* v. *Illinois,* 386 U.S. 300.[6]

2. *a.* Since probable cause was shown by agent Burnett's testimony as to the informant's reliability and agent Martin's confirmation at the border of what the informant had stated, the trial court properly refused to direct disclosure of the informant's identity at the pre-trial suppression hearing. *McCray* v.

[5] Petitioners argue that since the government stated that the informant was not a participant (Tr. 89) the information must have been second-hand. The informant could, however, have seen the truck being loaded without being a participant.

[6] Petitioner Nolte suggests (Pet. No. 1315, p. 14) that cross-examination of Customs agent Burnett was unduly limited under *Perry* v. *United States,* 336 F. 2d 748 (C.A.D.C.). The agent was, however, extensively cross-examined as to the informant's statements (Tr. 33–42) and the prior information he had supplied (Tr. 51–54). The agent testified that the informant did not report how he got his information (Tr. 32–33).

Illinois, 386 U.S. 300, 311–312. The decision in *United States* v. *Tucker*, 380 F. 2d 206, 211 (C.A. 2) is not to the contrary since that decision recognized that where, as here, the information given is corroborated, the identity of the informant need not be disclosed.

b. Petitioner Timmons (Pet. 11–13) contends that since he was not an occupant of either of the vehicles, the disclosure of the identity of the informant could have aided his defense at trial because the informant might have testified that he was not one of the purchasers. But there was no suggestion in the government's case that Timmons was a purchaser in Mexico. He was convicted on evidence that he owned the two vehicles and that the marihuana was driven to his home, unloaded in his garage and placed in his house in his presence. Nothing that occurred in Mexico could detract from the reasonableness of the inference that he knew of the illegal importation and participated directly in its illegal concealment.

By the same token, whatever the informant might have seen in Mexico would not conflict with the clear evidence of petitioner Nolte's guilt; she not only drove the truck containing the marihuana across the border but was present in the house when the drugs were unloaded and placed in plain view. The court therefore properly refused to require disclosure of the identity of the informant. *Rugendorf* v. *United States*, 376 U.S. 528.

3. At trial, agent Burnett was permitted to testify over objection as to what the informant had told him prior to the surveillance (Tr. 216–221), and agent Martin was permitted to state what agent Burnett

had told him in that regard (Tr. 294–297).[7] The court of appeals, in reversing the conviction of Clark Timmons, ruled that this was inadmissible hearsay which may well have been the "determining factor in the jury's mind" in finding him guilty (Pet. No. 1279, App. A 19). Assuming *arguendo* the correctness of that ruling,[8] it did not require a like ruling as to petitioners. It should be recalled that Clark Timmons had driven the station wagon (which apparently contained no narcotics) across the border and did not arrive at the house until after the panel truck was unloaded and his co-defendants had been placed under arrest (Tr. 308, 322–328, 357, 362). Petitioners were in an entirely different posture since the marihuana was unloaded and seized in their presence. The court correctly concluded that this other evidence was so "overwhelming" as to render the "error" in the admission of the third party statements harmless as to them.

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[7] In opening argument, government counsel stated that the agents would testify as to the information provided by the informant. After objection, the government stated out of the jury's presence that it intended by this evidence to show only the state of mind of the officers at the time they began the investigation. The court agreed and decided to so instruct the jurors. Although it failed to do so, petitioner failed to object to the lack of that instruction or request it (Tr. 435–453).

[8] The admission of third-party statements to show state of mind does not violate the hearsay rule. See, *e.g.*, *Davis* v. *United States*, 411 F. 2d 1126, 1127–1128 (C.A. 5); *Nash* v. *United States*, 405 F. 2d 1047, 1052–1053 (C.A. 8); *Craft* v. *United States*, 403 F. 2d 360, 363 (C.A. 9); *Busby* v. *United States*, 293 F. 2d 328, 332–333 (C.A. 9), certiorari denied, 369 U.S. 876. And while the trial court did not instruct the jury as to the limited use to be made of these statements, the defense raised no objection to this omission. See Rule 30 F.R.Cr.P.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Asistant Attorney General.

BEATRICE ROSENBERG,
RICHARD L. PETRONELLA,
Attorneys.

MARCH 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971